The Private Competition Enforcement Review

Tenth Edition

Editor
Ilene Knable Gotts

Law Business Research

The Private Competition Enforcement Review

The Private Competition Enforcement Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in
The Private Competition Enforcement Review - Edition 10
(published in March 2017 – editor Ilene Knable Gotts)

For further information please email
Nick.Barette@thelawreviews.com

The Private Competition Enforcement Review

Tenth Edition

Editor
Ilene Knable Gotts

Law Business Research Ltd

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Felicity Bown, Thomas Lee

SENIOR ACCOUNT MANAGER
Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall, Sophie Emberson,
Sian Jones, Laura Lynas

MARKETING AND READERSHIP COORDINATOR
Rebecca Mogridge

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Caroline Herbert

SUBEDITOR
Anne Borthwick

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2017 Law Business Research Ltd
www.TheLawReviews.co.uk
No photocopying: copyright licences do not apply.
The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of February 2017, be advised that this is a developing area.
Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-910813-45-4

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAN CEDERQUIST KB

AFFLECK GREENE MCMURTRY LLP

AGUILAR CASTILLO LOVE, SRL

ANGARA ABELLO CONCEPCION REGALA & CRUZ LAW OFFICES (ACCRALAW)

CMS REICH-ROHRWIG HAINZ RECHTSANWÄLTE GMBH

COMPASS LEXECON

CYRIL AMARCHAND MANGALDAS

ERDEM & ERDEM LAW OFFICE

HERBERT SMITH FREEHILLS

HOUTHOFF BURUMA

KING & WOOD MALLESONS

LÓPEZ MELIH & ESTRADA

M FIRON & CO

MAGALHÃES E DIAS ADVOCACIA

MARVAL, O'FARRELL & MAIRAL

NORTON ROSE FULBRIGHT

POPOVICI NIȚU STOICA & ASOCIAȚII

SRS ADVOGADOS

URÍA MENÉNDEZ ABOGADOS, SLP

WACHTELL, LIPTON, ROSEN & KATZ

WEBB HENDERSON

WILLKIE FARR & GALLAGHER LLP

WILSON SONSINI GOODRICH & ROSATI

CONTENTS

Editor's Preface vii
Ilene Knable Gotts

Chapter 1 EU OVERVIEW.. 1
Stephen Wisking, Kim Dietzel and Molly Herron

Chapter 2 ESTIMATING CARTEL DAMAGES IN THE EUROPEAN UNION.. 23
Enrique Andreu, Jorge Padilla, Nadine Watson and Elena Zoido

Chapter 3 ARGENTINA.. 31
Miguel del Pino and Santiago del Rio

Chapter 4 AUSTRALIA.. 43
Tom Bridges

Chapter 5 AUSTRIA 51
Bernt Elsner, Dieter Zandler and Molly Kos

Chapter 6 BRAZIL 63
Carlos Francisco de Magalhães, Gabriel Nogueira Dias and Cristiano Rodrigo Del Debbio

Chapter 7 CANADA 78
W Michael G Osborne, Michael Binetti, David Vaillancourt and Fiona Campbell

Chapter 8 CHINA.. 98
Susan Ning, Kate Peng and Sibo Gao

Chapter 9 ENGLAND & WALES 109
Peter Scott, Mark Simpson, James Flett and Amanda Town

Chapter 10 FRANCE 147
Marta Giner Asins and Arnaud Sanz

Chapter 11 GERMANY 165
Susanne Zuehlke

Chapter 12 GUATEMALA........ 178
Juan Carlos Castillo Chacón and Natalia Callejas Aquino

Chapter 13 HONG KONG 183
Mark Jephcott and Adelaide Luke

Chapter 14 INDIA 196
Vandana Shroff and Rahul Goel

Chapter 15 ISRAEL........ 206
Eytan Epstein, Tamar Dolev-Green and Eti Portook

Chapter 16 MEXICO 234
Juan Pablo Estrada-Michel

Chapter 17 NETHERLANDS 242
Rick Cornelissen, Naomi Dempsey, Albert Knigge, Paul Sluijter and Weyer VerLoren van Themaat

Chapter 18 PHILIPPINES 265
Patricia-Ann T Prodigalidad and Christopher Louie D Ocampo

Chapter 19 PORTUGAL........ 285
Gonçalo Anastácio

Chapter 20 ROMANIA 299
Silviu Stoica, Mihaela Ion and Laura (Bercaru) Ambrozie

Chapter 21 SOUTH AFRICA........ 311
Candice Upfold

Chapter 22 SPAIN 328
Alfonso Gutiérrez and Tomás Arranz

Chapter 23 SWEDEN 343
Elsa Arbrandt and Fredrik Lindblom

Chapter 24 TURKEY 352
H Ercüment Erdem and Mert Karamustafaoğlu

Chapter 25 UNITED STATES 363
Chul Pak and Daniel P Weick

Appendix 1 ABOUT THE AUTHORS... 383

Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....... 403

EDITOR'S PREFACE

Private competition litigation can be an important complement to public enforcement in the achievement of compliance with the competition laws. For example, antitrust litigation has been a key component of the antitrust regime for decades in the United States. The US litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts, and, in a small number of matters, trials, to resolve the rights of the parties. The process imposes high litigation costs (both in terms of time and money) on all participants, but promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs create an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high levels of litigation activity, particularly involving intellectual property rights and cartels.

Until the last decade or so, the United States was one of the few outliers in providing an antitrust regime that encouraged private enforcement of the antitrust laws. Only Australia had been more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Brazil provided another, albeit more limited, example: Brazil has had private litigation arise involving non-compete clauses since the beginning of the 20th century, and monopoly or market closure claims since the 1950s. In the last decade, we have seen other regimes begin to provide for private competition litigation in their courts, typically, as discussed below, only after (i.e., as a 'follow on' to) public enforcement. In some jurisdictions (e.g., Argentina, Lithuania, Mexico, Romania, Switzerland and Venezuela), however, private actions remain very rare, or non-existent (e.g., Nigeria) and there is little, if any, precedent

establishing the basis for compensatory damages or discovery, much less for arbitration or mediation. Also, other jurisdictions (e.g., Switzerland) still have very rigid requirements for 'standing', which limit the types of cases that can be initiated.

The tide is clearly turning, however, with important legislation either recently having been adopted or currently pending in many jurisdictions throughout the world to provide a greater role for private enforcement. In Australia, for example, the government is undertaking a comprehensive review and is now considering the implementation of significant changes to its private enforcement law. The most significant developments, though, are in Europe as the EU Member States prepare legislative changes to implement the EU's directive on private enforcement into their national laws. The most significant areas to be standardised in most EU jurisdictions involve access to the competition authority's file, the tolling of the statute of limitations period, and privilege. Member States are likely to continue to differ on issues relating to the evidentiary effect of an EU judgment and whether fines should be factored into damages calculations. Even without this directive, many of the Member States throughout the European Union have increased their private antitrust enforcement rights.

The development of case law in jurisdictions also has an impact on the number of private enforcement cases that are brought. In China, for instance, the number of published decisions has increased and the use of private litigation is growing rapidly, particularly in cutting-edge industries such as telecommunications, the internet and standard essential patents. In Korea, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In contrast, in Japan, over a decade passed from the adoption of private rights legislation until a private plaintiff prevailed in an injunction case for the first time; also it is only recently that a derivative shareholder action has been filed. Moreover, in many other jurisdictions as well, there remain very limited litigated cases. For example, there have been a growing number of private antitrust class actions commenced in Canada; none of them have proceeded to a trial on the merits.

The English and German courts are emerging as major venues for private enforcement actions. The Netherlands has also become a 'preferred' jurisdiction for commencing private competition claims. Collective actions are now recognised in Sweden, Finland and Denmark. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and France and England have also taken steps to facilitate collective action or class-action legislation. In addition, in France, third-party funding of class actions is permissible and becoming more common. In China, consumer associations are likely to become more active in the future in bringing actions to serve the 'public interest'.

Differences will continue to exist from jurisdiction to jurisdiction regarding whether claimants must 'opt out' of collective redress proposals to have their claims survive a settlement (as in the UK), or instead must 'opt in' to share in the settlement benefits. Even in the absence of class action procedures, the trend in Europe is towards the creation and use of consumer collective redress mechanisms. For instance, the Netherlands permits claim vehicles to aggregate into one court case the claims of multiple parties. Similarly, in one recent case in Austria, several parties filed a claim by assigning it to a collective plaintiff. Some jurisdictions have not to date had any private damages awarded in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages. Most jurisdictions impose a limitation period for

bringing actions that commences only when the plaintiff knows of the wrongdoing and its participants; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil, Canada and Switzerland, although Switzerland has legislation pending to toll the period) or injunctive litigation. Some jurisdictions base the statute of limitations upon the point at which a final determination of the competition authorities is rendered (e.g., India, Romania, South Africa and Austria) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions such as Australia and Chile, it is not as clear when the statutory period will be tolled. In a few jurisdictions, it is only after the competition authority acts that a private action will be decided by the court. Of course, in the UK – an EU jurisdiction which has been one of the most active and private-enforcement friendly fora – it will take time to determine what impact, if any, Brexit will have.

The greatest impetus for private competition cases is the follow-up litigation potential after the competition authority has discovered – and challenged – cartel activity. In India, for instance, as the competition commission becomes more active in enforcement investigations involving e-commerce and other high-technology areas, the groundwork is being laid for future private antitrust cases. The interface between leniency programmes (and cartel investigations) and private litigation is still evolving in many jurisdictions, and in some jurisdictions it remains unclear what weight to give competition agency decisions in follow-on litigation private cases and whether documents in the hands of the competition agency are discoverable (see, for example, Germany and Sweden). Some jurisdictions, such as Hungary, seek to provide a strong incentive for utilisation of their leniency programmes by providing full immunity from private damages claims for participants. In contrast, other jurisdictions, such as the Netherlands, do not bestow any benefit or immunity in a follow-on damages action. These issues are unlikely to be completely resolved in many jurisdictions in the near term.

There is one point on which there is almost universal agreement among jurisdictions: almost all have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. A few jurisdictions, such as the UK, however, are prepared to allow claims in their jurisdictions when there is a relatively limited connection, such as when only one of a large number of defendants is located there. In contrast, in South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis.

The litigation system in each jurisdiction to some extent reflects the respective perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Austria, Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands and the UK), with liability arising for participants who negligently or knowingly engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway and the Netherlands); others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, with some (e.g., Russia) focusing on the potential for 'unjust enrichment' by the defendant. In Brazil, there is a mechanism by which a court can assess a fine to be paid by the defendant to the Fund for the Defence of Collective Rights if the court determines the amount claimed as damages is too low compared with the estimated size and gravity of the antitrust violation. Still others are concerned that

private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permitting the enforcement officials to participate in the case (e.g., in Brazil, as well in Germany, where the competition authorities may act as *amicus curiae*).

Some jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Chile, India, Turkey and Venezuela). Interestingly, no other jurisdiction has chosen to replicate the United States' system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). In Venezuela, however, the plaintiff can get unforeseen damages if the defendant has engaged in gross negligence or wilful misconduct. And in Israel a court recently recognised the right to obtain additional damages on the basis of 'unjust enrichment' law. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Cultural views also clearly affect litigation models. Outside the EU and North America, the availability of group or class actions varies extensively. A growing minority of jurisdictions embrace the use of class actions, particularly following a cartel ruling by the competition authority (e.g., Israel). Some jurisdictions (e.g., Turkey) permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany and Korea generally do not permit representative or class actions but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., China, Korea and Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis, or even permit courts to join similar lawsuits (e.g., Romania and Switzerland). In Japan, class actions were not available except to organisations formed to represent consumer members; however, a new class action law came into effect in 2016. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Japan, Korea, the Netherlands, Switzerland and Spain), also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA Court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes that 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work product or joint work

product privileges in Japan; pre-existing documents are not protected in Portugal; limited recognition of privilege in Germany; and extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents by the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland). The culture in some jurisdictions, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pretrial settlement conference is mandatory.

As suggested above, private antitrust litigation is largely a work in progress in many parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction is favourable to the recognition that private antitrust enforcement has a role to play. Many of the issues raised in this book, such as the pass-on defence and the standing of indirect purchasers, remain unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues, such as privilege, are subject to change both through proposed legislative changes as well as court determinations. The one constant across almost all jurisdictions is the upward trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
February 2017

Chapter 1

EU OVERVIEW

Stephen Wisking, Kim Dietzel and Molly Herron[1]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

i Background – the EU Damages Directive

Although EU law provides a right to 'full compensation' for those who have suffered harm as a result of breaches of EU competition law,[2] private antitrust claims are brought in the national courts of the EU Member States and are largely governed by the national law of those Member States, subject to applicable EU law.

Until very recently there was no EU-level regulation of the rules applicable to competition claims, which at national level are largely the same as those that apply to civil litigation generally and which can differ significantly between Member States (in particular between Member States with a common law legal system – such as the UK – and those with a civil law system – such as France and Germany). The questions of jurisdiction and applicable law were (and remain) subject to EU harmonising legislation (which applies to competition claims and more widely),[3] but in relation to all other aspects only the general EU law principles of effectiveness and equivalence applied. These principles mean that Member States are obliged to have in place procedural rules which (1) do not render it practically impossible or excessively difficult for claimants to exercise the right to compensation; and (2) are not less favourable than the rules governing similar domestic actions.

1 Stephen Wisking and Kim Dietzel are partners and Molly Herron is a senior associate at Herbert Smith Freehills LLP.

2 As established by the Court of Justice of the European Union (CJEU) in Case C-453/99 *Courage v. Crehan* and Joined Cases C-295/04 *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, C-296/04 *Antonio Cannito v. Fondiaria Sai Assicurazioni SpA*, C-297/04 *Nicolò Tricarico v. Assitalia Assicurazioni SpA* and C-298/04 *Pasqualina Murgolo v. Assitalia Assicurazioni SpA* (*Manfredi*).

3 See below.

However, this all changed when the EU Damages Directive[4] was adopted on 26 November 2014.

The Directive's stated aims are to enhance the ability of those who have suffered harm as a result of anticompetitive behaviour to effectively exercise their right to compensation; reduce the differences between the national rules of Member States governing private antitrust actions thus creating a 'more level playing field'; and regulate the relationship between public and private enforcement of the competition rules in order to maximise the effectiveness of both.[5] It requires Member States to ensure that their national regimes meet, as a minimum, a series of requirements designed to achieve these aims. The Directive's provisions apply to claims based on infringements of EU competition law as well as to infringements of national competition law where applied in parallel with EU law. As discussed below, however, the Directive does not deal with a number of key aspects of competition litigation, which remain governed by national rules (subject to the principles of effectiveness and equivalence).

ii Recent activity

EU Damages Directive

The deadline for implementation of the Directive by Member States was 27 December 2016. At the time of writing (January 2017), according to the European Commission's website[6] only six of the 28 Member States (Denmark, Finland, Hungary, Luxembourg, Slovakia and Sweden) have implemented the Directive,[7] while in a large number of other Member States proposals are still proceeding through the relevant national legislative process (e.g., the UK, Germany and Austria). In other Member States, although stakeholder consultations have been conducted, the legislative process has yet to commence (such as Spain and Portugal). Some Member States have indicated that implementation will not take place until a considerable number of months after the deadline.[8]

In the case of failure to implement by the required deadline, it remains to be seen whether parties to private antitrust litigation will successfully invoke EU law doctrines of, for example, 'direct effect', to oblige national courts to apply the Directive's provisions directly, or 'indirect effect', to require national courts to interpret national law in line with the Directive.[9]

4 Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States of the European Union (the Directive).

5 See Article 1 and Recitals 1-11 of the Directive.

6 See http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html. This also notes that Latvia has implemented Article 17(2) of the Directive.

7 According to other sources, Lithuania and Italy have also enacted the necessary legislation to implement the Directive.

8 See, for example, 'EU NCAs see timely implementation of Damages Directive, mixed impact – PaRR survey', PARR report of 5 December 2016.

9 The extent to which delayed implementation will have a material impact on parties to litigation also depends on the approach the relevant Member States take to transition (i.e., which claims the relevant provisions will apply to when implemented). In relation to provisions which apply only to infringements that commence after the implementation date the delay may have limited impact.

In the absence of full and final implementation, it is difficult to comment in detail on the approaches taken to specific issues by the various Member States. It is clear, however, that there will be differences between the approaches of Member States both in general terms (e.g., whether to apply the Directive's changes only to cases with an EU dimension,[10] or whether to go beyond what the Directive strictly requires and apply these to all private competition claims (even those involving solely national competition law), thus creating a consistent regime for all private antitrust enforcement[11]) and in relation to specific provisions of the Directive (as discussed further below).

It is therefore too early to determine the extent to which implementation approaches will differ, and how likely it is that the European Commission's aim of reducing the divergences between the rules in different Member States will be met. However, it appears likely that significant divergences will remain, including in light of the fact that Member States can go further than the provisions of the Directive, the ambiguities as to what the Directive requires on some issues (which in many cases Member States do not appear to be attempting to resolve within the relevant national implementing legislation, for example as to the precise operation of its limitation provisions, as discussed further below), and the fact that a number of key aspects of private antitrust enforcement are outside the scope of the Directive, including funding and costs, non-monetary relief, and the question of collective redress.[12]

It also appears that when the Directive's provisions will actually have any impact in practice will also differ between Member States. Article 22 of the Directive provides that national measures implementing the substantive provisions of the Directive (which are not identified) must not apply retroactively, and that other provisions (i.e., procedural provisions) must not apply to actions already before the national court prior to 26 December 2014. Member States appear to be taking different approaches to the question of what provisions qualify as substantive and as to non-retroactivity. Some Member States (including the

10 As planned in the Netherlands.

11 This appears to be the approach being taken by a large majority of Member States (including the UK for example) in order to avoid uncertainty and satellite litigation, given the potential difficulties in determining whether EU law applies due to the breadth of the 'effect on trade' criterion for the applicability of EU law, and inconsistency. Spain is reportedly considering whether to go further, by taking the opportunity to extend the Directive's provisions on document disclosure to civil litigation more generally.

12 The Directive also does not address which entities should be liable for damages for breach of competition law, for example whether this is only the infringing companies themselves, or also other companies within the same 'undertaking' or 'single economic unit' for EU competition law purposes, or successor companies such as purchasers. This question has been debated at UK level in the jurisdictional context (although no final judgment has been issued), and the Dutch District Court has recently ruled in the context of the *Elevators* cartel that parent companies are not liable for damages arising from antitrust infringements committed by their subsidiaries. A number of Member States, including Finland and Portugal, have sought or intend to address some of these questions as part of their implementation of the Directive. Other Member States – including Germany – plan to leave this point to be decided by the courts (which may potentially include preliminary references to the CJEU at some point in the future).

UK) are planning to apply the Directive's substantive provisions only to claims relating to anticompetitive conduct commencing after implementation (which, given the duration of some cartel conduct in particular, may mean the Directive's provisions do not apply for many years). Other Member States may take different approaches (e.g., with the provisions taking effect in relation to any claims brought after the implementation date or in relation to damage arising after that date, even if the behaviour occurred or began earlier). These divergences may have the most marked impact, and give rise to challenges by parties to litigation (e.g., arguing that the Directive has not been correctly implemented), in relation to issues of limitation[13] and the exceptions to joint and several liability.

European Commission developments

Article 16 of the Directive requires the European Commission to issue guidelines for national courts on estimating the share of any overcharge which was passed on to an indirect purchaser (the Directive having confirmed that Member States must allow a passing-on 'defence' – see below). In preparation for this, the Commission commissioned a study from economic consultancy RBB Economics and law firm Cuatrecasas, Gonçalves Pereira on the passing on of overcharges, which was published in October 2016.[14] The study provides an overview of previous case law and economic techniques, and sets out a framework for evaluating the question of passing on. The Commission's guidance is awaited.

Judicial developments

Judicial developments at EU level during 2016 have been limited.

The only developments of note relate to litigation at the intersection of public and private enforcement as to the extent to which the European Commission can disclose information about a cartel within the public non-confidential version of its infringement decision. Prior to the disclosure rights introduced by the Directive (see below), the scope for claimants to obtain *inter partes* disclosure in civil law jurisdictions has been limited. Potential damages claimants have therefore first sought to obtain documents from the Commission or national competition authority through access to file procedures,[15] and second pushed for the

13 For example we understand that, under the current proposals, in Germany the extension of the duration of the limitation period from three to five years will be applied retrospectively, provided the claim was not already time-barred.

14 Available at http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf.

15 So far as we are aware no judgments have been issued by the General Court or CJEU as to access to documents under the Transparency Regulation (Regulation (EC) No. 1049/2001 regarding public access to European Parliament, Council and Commission documents) in 2016 in respect of antitrust cases, on which the applicable legal approach is now clear following the CJEU's 2014 *EnBW* judgment (Case C-365/12 P *European Commission v. EnBW Energie Baden-Württemberg*). However, challenges to the Commission's refusal to provide access to documents on particular facts continue to be brought, with judgment pending in Case T-611/15 *Edeka-Handelsgesellschaft Hessenring (EHH) v. Commission* regarding access to the *EIRD* cartel decision for example. Depending on how national courts approach the new disclosure regime introduced by the Directive, there may be a reduction in the attempted use of this route by claimants/potential claimants in favour of *inter partes* disclosure in national courts.

publication of the widest category of information possible within infringement decisions, to assist with identifying and bringing claims (as well as for earlier publication of Commission decisions). In relation to the latter route, addressees of the Commission's decision have generally resisted such disclosure by the Commission on a wide variety of grounds, in practice often motivated at least in part by concerns that such publication would make them more vulnerable to damages actions.

In a series of cases in 2015[16] the General Court allowed the Commission a wide discretion to choose to disclose more information in the non-confidential version of the decision than in its previous practice (including publishing fuller versions of the same cartel decision than it had published previously). It rejected arguments that to do so would undermine leniency incentives or that leniency recipients had legitimate expectations that such information would not be included in the public version of the decision, including in light of the Commission's practice of refusing to disclose leniency information in response to requests under the Transparency Regulation.[17]

Two appeals from the General Court's judgments in this regard are now pending before the CJEU. In Case C-162/15 *Evonik Degussa GmbH* the appellant is challenging the rejection of redaction requests in connection with the *Bleaching Chemicals* cartel decision, in particular the refusal to grant confidential treatment to certain information contained within its leniency application. In an important procedural step, in March 2016 the CJEU granted Evonik interim measures preventing the Commission from publishing the disputed decision pending final judgment in the appeal. In July 2016 Advocate General Szpunar handed down his opinion, recommending the CJEU dismiss the appeal. He stated that, even though the Commission must exercise a certain restraint as regards publication of information received from a leniency applicant, only disclosure of information which would enable the reader to reconstruct the precise content of the passages from the leniency statements (i.e., which would be equivalent to its partial disclosure, such as quotations), and which would enable the source of the information to be traced, is prohibited. The fact that a reader who is aware of the identity of the leniency applicant may speculate that one or another item of information within the decision was provided in the context of its cooperation is not sufficient to qualify the information as confidential. The Advocate General also expressed his opinion that avoiding damages liability – including by seeking to conceal the importance of Evonik's role in the infringement – is not an interest worthy of protection when considering confidentiality of the decision.

The CJEU's judgment in this case, and in Case C-517/15 *AGC Glass Europe*, which raises similar issues, is awaited.

Given the (actual or perceived) importance of the information contained within the Commission decision to claimants launching damages actions (including as the basis of a reasoned justification to seek *inter partes* disclosure under the Directive's disclosure regime

16 First, Case T-462/12 *Pilkington Group Ltd v. European Commission* and Case T-465/12 *AGC Glass Europe SA and others v. European Commission*, concerning the *Car Glass* cartel decision, and second, Case T-341/12 *Evonik Degussa GmbH v. European Commission* and Case T-345/12 *Akzo Nobel NV and others v. European Commission*, concerning the *Bleaching Chemicals* cartel decision.

17 The General Court also largely rejected arguments based on business secrets or commercial confidentiality given the age of the information in question.

(see below)), it is likely that disputes about the information included in the public version of decisions will continue, together with disputes at national level as to the extent to which claimants can obtain disclosure of the confidential versions of decisions through *inter partes* disclosure (which has been a much-debated topic in the UK, for example[18]).

National developments

In the meantime, private antitrust enforcement has continued to develop apace in some Member States, with 2016 seeing important developments at national level, not least in the UK, where a very significant judgment was issued by the Competition Appeal Tribunal (CAT) in relation to multilateral interchange fees in *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated and Others*[19] in July 2016. The CAT awarded significant damages, plus compound interest, and for the first time considered the scope and application of the passing-on defence in English law. It is notable that the CAT discussed (although did not formally apply) the Directive's provisions on passing-on in this context. Similarly, the Dutch Supreme Court discussed the provisions of the Directive when ruling on the existence of the passing-on defence in Dutch law in July 2016 (in the context of the claim by TenneT against ABB in relation to the *Gas Insulated Switchgear* cartel). The recognition of passing on prior to implementation of the Directive in a number of jurisdictions is important clarification, given that, as noted above, depending on the approach adopted to retrospectivity in each Member State, it may be some time before the Directive's provisions actually have effect.

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

i Overview

As discussed in Section I, *supra*, the Directive provides for the first time an EU law framework for private competition enforcement. Once all Member States have implemented the Directive, a core set of rules common to all Member States should be in place. The Directive obliges Member States to 'ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and obtain full compensation for that harm', and sets out a series of more detailed minimum requirements which Member States must meet in order to enable such claims to be brought, including as to disclosure of evidence, limitation, joint and several liability and contribution, passing-on and the impact of consensual dispute resolution.

As noted above, the Directive does not, however, deal with every aspect of competition damages actions. Notably it does not require Member States to introduce collective redress mechanisms (the omission of this essentially allowed political agreement to adopt the Directive to be reached). However, at the same time as proposing the Directive the Commission published a 'Recommendation' inviting Member States to adopt collective redress regimes in respect of EU law rights complying with specified principles (see Section VII, *infra*).

18 See, for example, the judgment of the English Court of Appeal in *Air Canada & Ors v. Emerald Supplies Ltd & Ors* [2015] EWCA Civ 1024.

19 [2016] CAT 11.

The Directive does not deal with the question of jurisdiction (which in relation to defendants domiciled in EU Member States is regulated by the Recast Brussels Regulation,[20] which applies to civil and commercial proceedings more generally), nor does it address applicable substantive law (which again is regulated by wider EU legislation[21]).

Moreover, it does not deal with some key issues which are of great practical importance to the viability of private antitrust actions, namely costs and funding.

Finally, the Directive applies only to actions for damages. It does not deal with actions for injunctive relief, which in many stand-alone competition cases, in particular in relation to abuse of dominance, may be crucial, as the claimant's main aim will be to prevent or stop the allegedly anticompetitive behaviour.

It is also worth noting that even within the Directive's sphere of application, on some issues much of the detail is left to national law to regulate, as discussed further below.

ii Limitation

The national limitation rules vary greatly between Member States (and within a Member State in the case of the UK). In various jurisdictions the position is relatively claimant-friendly in some respects, with lengthy limitation periods and/or provisions that suspend the period due to concealment (particularly relevant in cartel cases)(such as in the UK) and/or an ongoing competition authority investigation (such as in Germany). In other Member States, pre-Directive prescription periods are relatively short (e.g., in Spain, where the period is just one year), or can start to run even before a claimant was aware of its potential claim. As a result, limitation is a key factor for claimants when choosing a forum. Moreover, in some cases defendants have sought to argue that the applicable law is different to that of the forum in order to argue that a more beneficial limitation period applies.[22]

This will change significantly as a result of the Directive. The Directive requires[23] Member States to ensure that the limitation period for relevant competition claims:

a is at least five years;

b does not begin to run until the infringement has ceased and the claimant knows or can reasonably be expected to know of (1) the behaviour and the fact that it constitutes an infringement; (2) the fact the infringement caused harm to it; and (3) the identity of the infringer; and

c is suspended or interrupted if a competition authority (i.e., the Commission or an EU national competition authority (NCA)) takes action in relation to the investigation in respect of the infringement to which the damages action relates. In this case the

20 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

21 On applicable law the EU has adopted the Rome I Regulation on the law applicable to contractual obligations ((EC) 593/2008), and the Rome II Regulation on the law applicable to non-contractual obligations ((EC) 864/2007).

22 See, for example, in the UK the argument raised by Pilkington in response to the damages claim brought by Peugeot that the law applicable to the various claims was French or Swedish law, rather than English law as claimed by the claimants, and that the claims were time-barred under those laws (see *Deutsche Bahn v. MasterCard* and *Peugeot v. Pilkington (Limitation point)* [2016] CAT 14).

23 Article 10.

suspension must end at the earliest one year after the infringement decision becomes final (i.e., when a decision can no longer be appealed[24]) or the proceedings are otherwise terminated.

The Directive also provides[25] that the limitation period must be suspended for the duration of any 'consensual dispute resolution process' in respect of those parties involved in that process.

The provisions as to when the limitation period starts to run and as to suspension will significantly lengthen the limitation period in many Member States,[26] exposing businesses to potential damages claims many years after an infringement has ceased.[27]

Moreover, there are a number of elements that are ambiguous, which may lead to divergent approaches between Member States, and which may be challenged by defendants in national courts and/or potentially result in a preliminary reference to the CJEU, which will give rise to inevitable delay in the cases in which these are being tested. These include what type of alternative dispute resolution or settlement discussions will be sufficient to trigger a suspension of the limitation period and in what circumstances such a suspension will commence and cease,[28] and what appeals mean the infringement decision is not final. This latter question has led to much litigation in the UK in relation to a similar provision applicable in the CAT, for example as to whether an appeal on penalty alone suspends the limitation period, and whether an appeal by one addressee of a Commission decision suspends the limitation period for all addressees or only for the appellant.[29] These issues may now be replicated in other Member States and at EU level.

---

24 Article 2(12).

25 Article 18.

26 It should be noted that Recital 36 to the Directive states that Member States should be able to maintain or introduce absolute limitation periods that are of general application, provided that the duration of such periods does not render it practically impossible or excessively difficult for claimants to exercise their right to full compensation. On this basis a Member State could in theory have in place an ultimate 'long stop date' (as many Member States currently do) of, for example, 15 years from when the harm was suffered. However, given the substantive provisions of the Directive do not contain this derogation, and uncertainty as to what length period would meet the effectiveness test, it is not clear whether any existing or newly introduced periods will survive challenge under the Directive.

27 For example, if a cartelist applied for leniency in respect of conduct between 2010 and 2015 and the Commission started an investigation in 2016, the Commission may not issue a decision until 2020, and appeals of that decision may not be resolved until at least 2025. This would mean that the limitation period (of at least five years) would not start to run again until 2026 (and may be further suspended during any relevant consensual dispute resolution negotiations), and therefore would expire in 2031 at the earliest.

28 In the UK, following concerns raised by stakeholders, some provision has been made to make this clearer within the draft implementing legislation, but this is not the case in all Member States.

29 On the first point the English appellate courts have held that an appeal concerning a penalty only does not extend the limitation period (which will therefore run from the date on which the deadline to lodge an appeal expired). See *BCL Old Co Limited v. BASF plc* [2009] EWCA Civ 434 and *BCL Old Co Limited v. BASF plc* [2012] UKSC 45. On the second, the

It is also worth noting that some Member States may choose to retain longer limitation periods than the five years mandated by the Directive (with the UK for example maintaining a six-year period for England and Wales). Member States may also maintain or take divergent approaches to other limitation issues, such as the applicable limitation provisions for contribution claims (see below), which is not dealt with within the Directive.

iii Jurisdiction

The question of jurisdiction is regulated, where the defendant is domiciled in a Member State,[30] by the Recast Brussels Regulation[31] (which replaced the previous, but similar, Brussels Regulation[32] for cases commenced on or after 10 January 2015).

The default rule under the Regulation is that 'persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state' (Article 4(1)). However, there are important exceptions, the most relevant of which for present purposes are Article 7(2) and Article 8(1).

Article 8(1) provides, in relation to claims against multiple defendants, that claimants can bring a claim in the courts of the place where any one of the defendants is domiciled, provided the claims are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'. This enables a number of defendants from different Member States to be sued together in one Member State provided one of them (the 'anchor defendant') is domiciled there. This is often used in cartel cases, where a claimant can find one anchor defendant domiciled in a favourable jurisdiction (e.g., the UK or the Netherlands)[33] and use this provision to bring in the other cartelists, even where they have no connection with that jurisdiction, as there is joint and several liability between them.

In the *CDC Hydrogen Peroxide* case,[34] the CJEU essentially endorsed this approach, at least where the defendants had been found to have participated in a 'single and continuous'

Supreme Court (supported by *amicus curiae* observations of the Commission) has held that a Commission decision constitutes a series of individual decisions and therefore the limitation period must be determined in relation to each defendant individually; accordingly, an appeal by one party does not lead to a suspension for non-appellants. See *Deutsche Bahn AG v. Morgan Advanced Materials plc* [2014] UKSC 24.

30 For non-EU defendants the position is regulated by national law (apart from defendants domiciled in Norway, Switzerland and Iceland, which are subject to the provisions of the Lugano Convention, which is very similar in its terms to the Recast Brussels Regulation).

31 Op cit.

32 Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

33 It is worth noting that defendants can also engage in forum shopping to some extent. The Regulation provides that once a court has been 'seised' of the action, all other courts must stay or dismiss cases brought subsequently. A potential defendant may therefore choose to begin proceedings for a negative declaration that a cartel caused no damage in its chosen jurisdiction (for example the 'Italian Torpedo' brought in connection with the *Synthetic Rubber* cartel; see *Cooper Tire & Rubber Company Europe Ltd & Ors v. Dow Deutschland Inc & Ors* [2010] EWCA Civ 864).

34 Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and others*.

cartel infringement. In this case only one of the addressees of the Commission's decision was based in Germany; it was used as an anchor defendant to bring in the other cartelists. When a settlement was reached with the original German anchor defendant, leading to the claim against it being withdrawn, the other defendants challenged the jurisdiction of the German court to hear the actions. Following a preliminary reference the CJEU held that the settlement with the anchor defendant did not alter this conclusion, unless it could be demonstrated that the out-of-court settlement had been deliberately delayed until proceedings had been brought for the sole purpose of establishing jurisdiction in Germany.

Article 7(2) provides that in matters relating to tort, delict or quasi-delict (which are the usual causes of action for competition claims) a person may be sued in the courts of the place where the harmful event occurred. EU case law has interpreted this to give the claimant a choice between the place where the event giving rise to the damage took place, and the place where the damage was suffered. In *CDC Hydrogen Peroxide* the CJEU held that the place of the causal event is the place of the conclusion of the cartel, but that in this case it was not possible to identify a single place as the cartel consisted of a number of collusive agreements made during various meetings or discussions across the EU. It therefore looked at the place where the damage occurred (i.e., where the alleged damage – the payment of the overcharge – actually manifested itself). The CJEU held that this is generally located at the relevant victim's registered office.[35]

III EXTRATERRITORIALITY

The EU competition law rules apply to any conduct (including conduct that occurs outside the EU and including conduct by foreign parties) that may restrict competition in the EU and may affect trade between EU Member States.

IV STANDING

EU case law[36] (now codified in the Directive[37]) provides that any person (natural or legal) may claim compensation for harm suffered provided there is a causal relationship between that harm and the infringement of competition law. This includes both direct purchasers and indirect purchasers.[38] The CJEU has also held that claimants with no direct or indirect contractual links with the infringers may also claim for so-called 'umbrella damages', where they have purchased products from third parties at prices inflated due to the general distortive effects of the cartel on the market.[39]

35 The CJEU also considered in this case arguments as to whether contractual jurisdiction clauses could override the normal position (as per Article 25). It noted that such a clause could only be effective if it covers disputes in connection with a breach of competition law, not where it abstractly refers to all disputes arising from the contractual relationship.

36 *Manfredi*, op cit.

37 Article 3(1).

38 See Article 12(1).

39 Case C-557/12 *Kone AG and others v. ÖBB-Infrastruktur AG* (*Kone*).

V THE PROCESS OF DISCOVERY

Disclosure is one of the key focuses of the Directive. The aim of the Directive in this area is twofold.

First, it aims to assist claimants by correcting the 'information asymmetry' (between the allegedly damaged party and the perpetrators of the competition law breach) which exists in many competition disputes, requiring Member States to introduce a level of disclosure into national law. The lack of extensive *inter partes* disclosure rules in many EU jurisdictions (with, for example, claimants being limited to seeking specific documents) is regarded as a key obstacle to successful private enforcement (albeit that Germany and the Netherlands remain key jurisdictions despite the relatively limited availability of disclosure). While the changes will not have a material impact in Member States where disclosure requirements already exceed those set out in the Directive (notably the UK, where the disclosure regime is a real benefit to claimants), it will have a major impact in many Member States with civil law systems where extensive disclosure is not currently a feature of civil litigation. This will therefore require significant cultural change.

Secondly, in what was one of the key driving forces behind the passing of the Directive, it aims to protect certain categories of document from disclosure in whole or in part, in particular putting in place an EU-wide regime in respect of 'leniency documents', replacing the 'balancing exercise' (i.e., an obligation on national courts to weigh up the interest in promoting damages claims versus the interest in protecting the public enforcement regime) which had been required by the CJEU in relation to such documents in the *Pfleiderer* case.[40]

Article 5 of the Directive therefore requires Member States to ensure that in damages proceedings national courts can (as a minimum[41]) order the defendant (or a third party) to disclose relevant evidence in its control in response to a 'reasoned justification' by a claimant.[42] The same right must also be afforded to the defendant in respect of evidence from the claimant (or a third party), for example in relation to passing-on. The Directive contains provisions to limit concerns of excessive disclosure and 'fishing expeditions'. The claimant must present reasonably available facts and evidence to support the plausibility of its claim and specify evidence, or categories of evidence, as precisely and narrowly as possible.[43] The national court must limit the disclosure of evidence to that which is proportionate,[44]

---

40 Case C360/09 *Pfleiderer AG v. Bundeskartellamt.*

41 Article 5(8) expressly provides that Member States can maintain or introduce rules that would lead to a wider disclosure of evidence.

42 Article 5(1).

43 Article 5(1)–(2).

44 Article 5(3). The proportionality assessment should take into account in particular the extent to which the claim or defence is supported by available facts and evidence justifying the disclosure request; the scope and cost of disclosure; and confidentiality. In relation to documents within the file of a competition authority the national court should also take into account the specificity of a disclosure request (in terms of the nature, subject matter or contents of documents), or whether this is just a non-specific application concerning documents submitted to a competition authority (Article 6(4)(a)).

have the power to protect confidential information,[45] and ensure applicable legal professional privilege rules are respected. The national court must also have the power to impose penalties in relation to the refusal to comply with the disclosure order or confidentiality requirements, the destruction of evidence, and breach of requirements as to the use of evidence.[46]

Article 6 of the Directive sets out a 'black list' and a 'grey list' of evidence included in the file of a competition authority containing limits on disclosure (disclosure of any other evidence within the file of a competition authority may be ordered at any time, subject to the Directive's general provisions on disclosure).[47]

In the black list[48] are:

a 'leniency statements', defined[49] as oral or written presentations voluntarily provided to a competition authority (or a record thereof)[50] describing the provider's knowledge of a cartel and its role therein, drawn up specifically for submission as part of a leniency or immunity application, and not including pre-existing information (i.e., that which exists independently of the proceedings of a competition authority (for example contemporaneous documents)), which national courts must be free to order disclosure of at any time;[51] and

b 'settlement submissions', defined[52] as voluntary presentations acknowledging the infringement drawn up specifically to enable the competition authority to apply a simplified or expedited procedure.

National courts cannot order disclosure of these categories of evidence at any time[53] (and any such evidence acquired through access to the file is to be inadmissible).[54] According to

45 Article 5(4). For example by redacting sensitive passages in documents, conducting hearings *in camera*, restricting the circle of persons entitled to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form (Recital 14).

46 Article 8.

47 Article 6(9). National courts must only order disclosure from the competition authority itself where no party or third party is reasonably able to provide the evidence (Article 6(10)).

48 Article 6(6).

49 Article 2(16).

50 To the extent that there are documents within the hands of the defendant which would in any event be disclosable, and not, for example, protected by legal professional privilege rules (the practice of allowing oral submissions having been developed by the Commission for this very purpose, originally to protect leniency statements from disclosure in US litigation). The privilege rules vary, however, considerably from Member State to Member State.

51 Recital 28.

52 Article 2(18).

53 This absolute bar is at odds with the CJEU ruling in Case C-536/11 *Bundeswettbewerbsbehörde v. Donau Chemie AG and others* in relation to an Austrian rule containing an equivalent prohibition. The CJEU held that a blanket ban on the disclosure of such documents without the possibility for a *Pfleiderer* balancing exercise to be undertaken was incompatible with the principle of effectiveness. However, this conclusion was reached on the basis of the absence of any EU legislation in this area.

54 Article 7(3).

Recital 26 to the Directive the black list should extend to 'verbatim quotations' from leniency statements or settlement submissions included in other documents, and should be limited to 'voluntary and self-incriminating' leniency statements and settlement submissions. National courts must have the power to review evidence to determine whether it does in fact fall within the black-listed categories.[55]

The grey list[56] contains:

a information prepared specifically for the proceedings of a competition authority;

b information drawn up by the competition authority and sent to the parties in the course of its proceedings; and

c settlement submissions that have been withdrawn.

National courts can only order disclosure of grey-listed evidence once a competition authority has closed its proceedings. After the competition authority has closed its proceedings national courts should (as part of the proportionality assessment) still consider the need to safeguard the effectiveness of public enforcement.[57] This arguably imports the need to carry out a *Pfleiderer* balancing exercise in relation to this category of information.

Although the Commission's aim was to provide clear and consistent rules in relation to the previously vexed question of the disclosure of leniency documents, potential ambiguities still remain. This includes how extracts within other documents (such as responses to information requests and to the statement of objections, the statement of objections itself and the confidential version of the decision) substantially replicating leniency submissions, but not amounting to 'verbatim quotes', should be dealt with.

Moreover, outside the black-listed categories, the requirement for a proportionality assessment before disclosure is ordered gives rise to the prospect of national courts in different Member States coming to different conclusions on similar disclosure requests (in particular given the varied legal traditions in this area). This fact – together with the ability of Member States to have wider disclosure rules in place and differing approaches to the possibility of pre-action disclosure for example – means that an uneven playing field is likely to remain in this area.

VI USE OF EXPERTS

The prevalence or otherwise of using experts and economists and the role of experts in court proceedings (e.g., whether experts are appointed by the parties, or as neutral advisers to the court) varies from Member State to Member State, but is generally established practice. The parties to damages proceedings (or threatened proceedings) routinely utilise economists to assess potential damages.

55 Article 6(7) and Recital 27.

56 Article 6(5).

57 Article 6(4)(c) and Recital 26.

This is reflected in the Commission's Communication on quantifying harm in antitrust damages actions[58] and its Staff Working Document 'A practical guide on quantifying harm',[59] adopted at the same time as the Directive was proposed, which discuss the main methods and techniques for assessing damages in different types of case, and which presuppose the involvement of economic experts in doing so.

VII CLASS ACTIONS

Although the Commission had previously proposed competition law-specific collective proceedings in its 2008 White Paper,[60] reaching agreement on this point was politically difficult (amid fears of creating a 'litigation culture', and concerns about the varying legal traditions in the different Member States), and therefore provision for collective redress was not included within the Directive.

However, at the same time as proposing the draft Directive, the Commission published a Recommendation on collective redress mechanisms, designed to improve access to justice for citizens and companies in respect of their EU law rights.[61] The Recommendation (and accompanying Communication[62]) invites Member States to adopt collective redress systems at national level that follow the same basic principles. The Recommendation takes the form of a 'horizontal' framework; in addition to competition, it applies in other fields where EU law rights exist, for example consumer protection, environmental protection, financial services legislation and protection of personal data. Unlike the Directive, it addresses both compensatory and injunctive collective redress.

There is no binding obligation on the Member States to implement the Recommendation, but they were recommended to do so by 26 July 2015. The Commission is now obliged to assess the implementation of the Recommendation,[63] by 26 July 2017,

58 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (2013/C 167/07).

59 Commission Staff Working Document: Practical guide – quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (SWD(2013) 205).

60 White Paper on damages actions for breaches of the EC antitrust rules (SEC (2008) 404) (COM/2005/0165 final).

61 Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU). This followed a 2011 public consultation carried out by the Commission's consumer affairs directorate.

62 'Towards a European Horizontal Framework for Collective Redress' COM(2013) 401 final.

63 In particular evaluating its impact on access to justice, the right to obtain compensation, the need to prevent abusive litigation, and the functioning of the single market, small and medium-sized enterprises (SMEs), competitiveness and consumer trust.

and whether further measures are needed. The EU Competition Commissioner, Margrethe Vestager, reportedly emphasised in November 2016 the need to scrutinise this carefully and follow up if necessary.[64]

The key principles or elements for collective redress systems outlined in the Recommendation are as follows:

a An opt-in model for collective redress for both stand-alone and follow-on claims, to be brought by representative entities or class members. However, the Recommendation provides that exceptions to the opt-in model should be possible if 'duly justified by reasons of sound administration of justice'.

b Rules on standing for entities that are authorised to bring representative collective actions, which provide that claims can be brought by entities that have been officially designated in advance based on stipulated requirements, or entities that have been certified on an *ad hoc* basis by a national court or authority for a particular representative action.

c Safeguards for minimising risks of abusive litigation, including verification by the courts that a collective action is an appropriate form of redress; judicial control to ensure that manifestly unfounded cases are not continued; the 'loser pays' principle to apply in respect of reimbursement of legal costs; the availability of contingency fees only exceptionally and with appropriate regulation; limitations on third-party funding; and no punitive damages.

d Encouragement of collective alternative dispute resolution and judicially approved collective settlement before and throughout the litigation.

Some Member States have implemented new or revised collective redress regimes since the Recommendation was adopted, although in the main these do not appear to have been prompted by the Recommendation. A key example is the UK competition-specific collective action and settlement regime introduced in October 2015 (and under which the first cases have now been brought), which has diverged from the Recommendation on the key issue of opt-in versus opt-out proceedings. Other examples are France and Belgium, both of which have recently adopted collective proceedings regimes that extend beyond the competition law sphere. In the Netherlands, in November 2016 the Dutch Minister of Security and Justice submitted a legislative proposal to the House of Representatives for an opt-out damages class actions regime with wide jurisdictional scope, covering all areas of law, although this has attracted some criticism and it is not yet clear whether the proposal will move forward in its current form.

It remains to be seen whether the Commission will seek to take further action in this area, but any attempt to make the introduction of collective redress mandatory (whether in relation to antitrust or more generally) is likely to be very controversial.

64 See 'Vestager calls for review of collective redress recommendation in 2017 – Bratislava Competition Day', PARR report of 23 November 2016.

VIII CALCULATING DAMAGES

Apart from the limited number of requirements set out in the Directive discussed below, causation and the quantification of damages are a matter for national law (subject to the requirements of effectiveness and equivalence).

The Directive provides (in addition to its provisions on passing-on, discussed in Section IX, *infra*) that:

a Member States must ensure 'full compensation' for those who have suffered harm caused by an infringement of competition law, which 'shall place a person who has suffered harm in the position in which that person would have been had the infringement not been committed'. This must include (as established in case law) compensation for actual loss and loss of profit and interest.[65]

b There should be no 'overcompensation', and therefore punitive or multiple damages are prohibited.[66] This contrasts with the pre-Directive position in some Member States where punitive damages were possible in some circumstances, for example in the UK where it was possible for the courts to award exemplary damages where there has been no fine imposed by a competition authority (removing double jeopardy concerns).[67]

c Member States must be empowered to estimate the amount of harm (where it has been established that the claimant suffered harm, but it is practically impossible or excessively difficult to precisely quantify this),[68] as is already the case in some Member States (e.g., Germany).

d It shall be presumed that cartel infringements cause harm, although this can be rebutted.[69] There is, however, no presumption as to the level of overcharge, which is to be welcomed (this can be contrasted with the position in Hungary, where a 10 per cent cartel overcharge is presumed). It is therefore unclear whether this provision will have any effect in practice, as claimants will adduce evidence as to the existence and level of overcharge, and defendants as to the absence or low level of overcharge.

e Member States must ensure that the NCA can 'assist the court' in respect of quantification where it wishes to do so.[70] Whether it is appropriate or useful for an NCA to do so is not clear, and NCAs' appetite for doing so remains to be seen.

---

65 Article 3. The level of interest, which may be a very substantial part of a claim, in particular where many years have passed since the infringement, is a matter for national law.

66 Article 3(3).

67 Exemplary damages were awarded by the CAT in *2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited* ([2012] CAT 1), in circumstances where the defendant had not been fined by the UK NCA.

68 Article 17(1).

69 Article 17(2).

70 Article 17(3).

In addition, as noted above, as a matter of EU law Member States must allow so-called 'umbrella damages' to be claimed. The CJEU has held[71] that a claimant may obtain compensation for the loss caused by a cartel, even if it did not purchase from the cartelists, where it is established that:

a the cartel was, in the circumstances of the case and the relevant market, liable to have the effect of umbrella pricing being applied by third parties (not party to the cartel) acting independently; and

b those circumstances could not be ignored by the members of that cartel.

In practice quantification is a crucial and complex issue, requiring significant data, and both claimants and defendants routinely utilise economic experts in order to estimate damage. As noted above, the Commission has published a Communication on quantifying harm in antitrust damages actions, together with the more detailed Staff Working Document 'A practical guide on quantifying harm',[72] which discuss the main methods and techniques for assessing damages (e.g., comparator models based on various temporal and geographic comparators, and simulation models) in different types of case (cartels and exclusionary practices). These are designed to offer assistance to parties and to national courts when quantifying damages, but are not binding.

IX PASS-ON DEFENCES

As noted above, indirect purchasers have standing within the EU. As codified within the Directive, any person (natural or legal) may claim compensation for harm suffered provided there is a causal relationship between that harm and the infringement of competition law.[73]

The Directive also provides that Member States must ensure (as was already the case in a number of Member States) that the passing-on 'defence' can be raised by the defendant[74] (without prejudice to the right of a claimant to claim compensation for loss of profits due to the volume effect resulting from passing on of an overcharge[75]). The Directive provides that the burden of proving passing-on lies on the defendant.

In relation to indirect purchaser claims, the Directive seeks to assist these, introducing some considerable complexity. Although the Directive states that an indirect purchaser claimant bears the burden of proving that an overcharge has been passed on to it (and to what degree),[76] it provides a rebuttable presumption that this burden is satisfied where the indirect purchaser has shown that:

a the defendant has committed an infringement of competition law;

b this infringement result in the direct purchaser paying an overcharge; and

71 *Kone*, op cit.

72 Op cit.

73 Articles 3 and 12 of the Directive.

74 Article 13.

75 Article 12(3).

76 Article 14(1).

c the indirect purchaser has purchased the relevant goods or services (or goods or services derived from or containing them).[77]

Given that, in particular in relation to EU-wide cartel infringements, claims are often brought by purchasers at different levels of the supply chain in different proceedings and in different Member States, the Directive attempts to deal with the risk of overcompensation (including as a result of the presumption discussed above) by providing that national courts must be able to take into account claims in relation to the same infringement but brought by claimants at different levels of the supply chain (and judgments thereon).[78] Whereas this might be possible within the same Member State (e.g., by jointly hearing claims), although this is still likely to be difficult and will depend on whether claims are brought within a similar time frame, quite how national courts are expected to do so in practice where claims are brought in different Member States (or even in different courts in the same Member State) is unclear. In some Member States – including within the draft UK implementing legislation – no provision has been made for implementing this requirement.

The Directive provides that national courts must have the power to estimate the share of any overcharge which is passed on,[79] and that the Commission will issue guidelines for national courts on how to do so.[80] This guidance is awaited. As noted above, in connection with this the Commission published a background expert study on the passing on of overcharges in October 2016.[81]

X FOLLOW-ON LITIGATION

There is no bar on claimants bringing actions against defendants who have been subject to public enforcement action, or have received immunity or leniency from the Commission or an NCA in respect of fines; indeed, such follow-on claims are currently the most common form of claim across the EU.[82]

As discussed above, however, under the Directive limitation periods must be suspended or interrupted where the competition authority is investigating. EU case law has also established that a national court cannot take a decision that is inconsistent with a decision taken by the Commission, and therefore where a Commission investigation is

77 Article 14(2).

78 Article 15.

79 Article 12(5).

80 Article 16.

81 Available at http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf.

82 In addition, Article 9 provides that an infringement of competition law found by a final decision of an NCA or review court is irrefutably established for the purposes of an action for damages brought within the same Member State. Where the final decision is taken in another Member State the decision must constitute 'at least *prima facie* evidence' that an infringement of competition law has occurred for the purposes of a damages action. Commission infringement decisions, when final, are binding on all Member State courts as a matter of EU law.

on-foot or where an appeal to the EU courts is pending, the national court proceedings must be stayed prior to judgment (a '*Masterfoods* stay'), in order to prevent the risk of conflicting decisions.[83]

In addition, the Directive contains provisions ameliorating the normal joint and several liability rules in relation to immunity recipients. This forms part of its aim to ensure that increased private enforcement does not undermine effective public enforcement, and in particular the leniency regime, given, *inter alia*, that leniency recipients who are less likely to appeal a decision are often the first target of damages claims.

As a starting point the Directive requires Member States to ensure that joint infringers (e.g., co-cartelists) are jointly and severally liable for the full harm caused by the joint infringement and therefore that the claimant has the right to require full compensation from any of the infringers.[84]

By way of derogation,[85] Member States must ensure that an immunity recipient is only jointly and severally liable to:

a its own direct or indirect purchasers (or suppliers); and
b other injured parties only where full compensation cannot be obtained by the other infringers.

In relation to contribution, the Directive requires Member States to ensure that an infringer can recover a contribution from its co-infringers, determined in accordance with the 'relative responsibility for the harm' borne by each of the co-infringers (a matter for national law – see below). Again the Directive provides that the amount of contribution payable by an immunity recipient to its co-infringers shall not exceed the amount of harm caused to its own direct or indirect purchasers (or providers).[86]

The extent to which these provisions provide comfort to would-be immunity applicants, and therefore whether they will increase leniency incentives, is questionable.

First, as the immunity recipient remains a debtor of last resort, and it is not clear when or how it will be determined whether full compensation may be obtained from co-infringers, an immunity recipient may be subject to an uncertain risk of greater liability for many years. This is compounded by the requirement within Article 11(4) that any limitation period applicable to such claims against immunity recipients is 'reasonable and sufficient to allow injured parties to bring such actions', which implies that such periods may be even lengthier than those required under the general limitation provisions discussed above. Secondly, there is no express limitation on the liability of an immunity recipient to its direct or indirect purchasers for its sales to or the harm it caused to those purchasers, which means that in a

83 C-344/98 *Masterfoods Ltd v. HB Icecream Limited.*

84 Article 11(1).

85 Article 11(4). Article 11(2) also contains a derogation from joint and several liability for SMEs (as defined in Commission Recommendation 2003/361/EC concerning the definition or micro, small and medium-sized enterprises), which meet certain conditions.

86 Article 11(5). In relation to any harm caused to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of the immunity recipient's contribution to the co-infringers shall be determined in the light of its relative responsibility for the harm (Article 11(6)) (i.e., on the basis of the normal rules).

multi-sourcing scenario it would appear to still be liable for its co-infringers' sales to the same purchasers. Thirdly, the provisions apply only to immunity recipients, not those undertakings who have received a partial reduction of fines as part of the leniency programme.

XI PRIVILEGES

The Directive provides that national courts must give full effect to applicable legal professional privilege when ordering the disclosure of evidence.[87] However, which privilege rules apply is a question of national law; the Directive does not provide that EU law privilege applies in damages proceedings. National privilege rules vary considerably, with relatively extensive protection for legal advice and litigation privilege under English law, and a much less developed doctrine in many civil law jurisdictions.[88]

XII SETTLEMENT PROCEDURES

The Directive does not mandate any alternative dispute resolution mechanisms or regulate settlement procedures generally (including as to the possibility of collective settlement).

As noted above, however, it does provide that limitation periods be suspended for the duration of any 'consensual dispute resolution process',[89] as is already the case under the rules of some Member States. It also provides that national courts seized of damages actions may suspend their proceedings for up to two years while the parties are involved in consensual dispute resolution.[90] It further provides that a competition authority may consider compensation payable under a settlement to be a mitigating factor when imposing a fine (it remains to be seen how often an undertaking will offer such compensation prior to an infringement decision having been issued,[91] and whether competition authorities will offer such a discount).

Most importantly, the Directive deals with the impact of settlement on joint and several liability and contribution, which to date have been key concerns for defendants seeking to settle cartel damages claims against them (with attempts to achieve finality through contractual mechanisms). These provisions are likely to assist in incentivising settlements in cartel cases.

Member States are required to ensure that, following a consensual settlement, the claimant's claim is reduced by the settling co-infringer's share of harm (not, notably, the

87 Article 5(6).

88 In circumstances where disclosure was limited this was of less concern, but following implementation of the Directive's provisions on discovery the question of privilege may assume greater importance in such jurisdictions.

89 Article 18(1).

90 Article 18(2).

91 This may occur, however, in cases where the undertaking is settling with the relevant competition authority.

amount it has actually paid[92])[93] and that it can only pursue its remaining claim against the non-settling co-infringers.[94] Crucially, non-settling co-infringers shall not be permitted to recover contribution for the remaining claim from the settling co-infringer.[95] In addition, when assessing contribution, national courts shall take 'due account' of any damages paid pursuant to a consensual settlement.[96]

XIII ARBITRATION

See Section XII, *supra*; arbitration is not treated differently from other consensual dispute resolution mechanisms.

The Directive does not preclude the inclusion of arbitration clauses within sales agreements that specifically deal with competition claims arising out of the relevant supply or purchase relationship.

XIV INDEMNIFICATION AND CONTRIBUTION

See Section X and XII, *supra*, for a description of the Directive's provisions on joint and several liability and contribution (and the impact of the receipt of immunity, and of settlement of claims, on these mechanisms).

In relation to contribution it is important to note that while the Directive provides that contribution is to be determined in light of the co-infringers' 'relative responsibility' for harm,[97] the question of how relative responsibility is to be allocated is left to national law, subject to the principles of effectiveness and equivalence (see Recital 37).

There is limited precedent on this point in most Member States, and some jurisdictions suggest that the starting point is equal apportionment among the number of cartelists. In practice, parties often proceed for the purpose of settlement discussions on the basis that contribution would likely be apportioned on the basis of relative sales to the claimant in question (although this does not, of course, provide a solution in the case of umbrella damages). Recital 37 mentions turnover, market share, and the role in the cartel as examples of relevant criteria for determination of responsibility. There therefore remains uncertainty on this point, and the potential for divergence across Member States.

92 Recital 51 provides that this reduction is 'regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party'. This, combined with the prohibition on contribution being sought from settling infringers, provides significant incentives for defendants to offer an early settlement.

93 Article 19(1).

94 Article 19(2). There is a derogation to this within Article 19(3) whereby if the non-settling co-infringers cannot pay the remaining damages due to the claimant, it may pursue the settling co-infringers. However, this can be expressly excluded under the terms of the settlement agreement, which it can be expected defendants will routinely seek to do.

95 Article 19(2).

96 Article 19(4).

97 Article 11(5).

Finally, the Directive does not specify what limitation periods should apply in relation to actions for contribution, which will therefore be a matter for national law. The limitation period for such claims in some Member States currently starts to run at the same time (or even earlier) than the limitation period for the primary claim.

XV FUTURE DEVELOPMENTS AND OUTLOOK

As discussed above, the majority of Member States are still in the process of implementing the Directive, and even when implemented it will be some time before many of its provisions start to bite.

It remains to be seen whether the Directive, when fully implemented, will lead to an increase in the level of effective private enforcement across the EU. In relation to those Member States in which private enforcement is already firmly established (notably Germany, the Netherlands and the UK) and where the applicable procedural rules on many topics already meet the requirements of the Directive, it is unlikely that the Directive will have a significant impact (other than to give rise to the prospect of procedural litigation as to the interpretation of some of its provisions).[98]

However, in other jurisdictions, where private enforcement is currently practically difficult to achieve, implementation of the Directive must be expected to lead to a greater number of damages actions (or out of court settlements), in particular as a result of its requirement for a greater level of document disclosure than currently exists in many Member States.

As the Directive introduces minimum requirements only, and Member States are entitled to retain or adopt measures which are more claimant friendly, the scope for forum shopping will remain, and therefore the Commission's desire for an even playing field seems unlikely. The current favoured jurisdictions for follow-on cartel damages claims also have the added advantage of a more experienced judiciary and an established claimant bar, offering a variety of funding options, and can therefore be expected to remain the jurisdictions of choice for some time.

The Commission is obliged to review the Directive and report on its impact to the European Parliament by December 2020. It remains to be seen whether this review – and that of the impact of the Recommendation on collective redress due in 2017 – will lead to further EU legislative action in this area.

98 In relation to the UK, the more significant question is the extent to which it can maintain its leading position in relation to damages actions based on European Commission cartel decisions once it leaves the EU, following the 'Brexit' vote in June 2016. This may depend in large part on the terms of exit, as well as judicial interpretation.

Appendix 1

ABOUT THE AUTHORS

STEPHEN WISKING

Herbert Smith Freehills LLP

Stephen Wisking practises in all aspects of competition law, advising clients across a broad range of sectors (including media, telecoms, pharma and energy). He is a pre-eminent competition litigator who is regularly instructed on the most complex and high-profile competition disputes (both regulatory appeals and private enforcement). Stephen is a qualified solicitor-advocate, and an active member of the User Group for the UK's specialist Competition Appeal Tribunal.

KIM DIETZEL

Herbert Smith Freehills LLP

One of the top 100 women in antitrust profiled by *Global Competition Review*, Kim Dietzel acts on the full spectrum of competition law issues across a range of sectors, including the aviation sector where she has a particular focus. Kim has a wealth of experience in relation to multi-jurisdictional cartel and leniency matters, and is one of the few competition practitioners with UK criminal cartel experience. Solicitor-advocate Kim has developed a leading private enforcement practice, acting in particular for defendants in precedent-setting follow-on damages cases, including appearing as an advocate in the Competition Appeal Tribunal.

MOLLY HERRON

Herbert Smith Freehills LLP

Molly Herron practises in all areas of competition law, including merger control, private litigation, cartel and other antitrust investigations, strategic competition advice and compliance counselling. She has advised clients across a wide range of sectors, with particular experience in the energy sector. Molly has published widely on private enforcement and other competition law issues, and is a co-editor of Jordan Publishing Limited's *Competition Law Journal*.

HERBERT SMITH FREEHILLS
Herbert Smith Freehills LLP
Exchange House
Primrose Street
London
EC2A 2EG
United Kingdom
Tel: +44 20 7374 8000
Fax: +44 20 7374 0888
stephen.wisking@hsf.com
kim.dietzel@hsf.com
molly.herron@hsf.com

www.herbertsmithfreehills.com